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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

BIOSUCCESS BIOTECH CO.,  
LTD.,

Plaintiff,  
v.

RICH PHARMACEUTICALS, INC.; IMAGIC, LLC, RICHARD CHANG HOLDINGS, LLC; BEN CHANG; and DOES 1 through 10.

## Defendants.

Case No.: 2:14-CV-00310-JAK (ANx)

OPPOSITION OF PLAINTIFF  
BIOSUCCESS CO., LTD. TO  
DEFENDANTS' MOTION TO  
DISMISS COMPLAINT

Judge: Hon. John Kronstadt  
Place: Courtroom 750, 7th Floor  
Date: May 12, 2014  
Time: 8:30 a.m.

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

## INTRODUCTION

Plaintiff Biosuccess Biotech Co., Ltd. (“Biosuccess”) is a pharmaceutical research and development company that is working on a promising method for treating serious conditions such as leukemia, HIV/AIDS, and stroke. Biosuccess has spent nearly a decade conducting medical research and development, painstakingly gathering data and other confidential information as the result of investing—and risking—valuable time and resources.

Defendant Ben Chang and his father have taken Biosuccess's valuable intellectual property and given it to their competing entity, defendant Rich Pharmaceuticals. Biosuccess filed this action to hold Defendants accountable for their unlawful actions that threaten to destroy not only Biosuccess's business, but the medical progress it has made over the years. Defendants move to dismiss in part based on the bold premise that this suit is "premature" because they do not yet have FDA-approved products available on the market.

Unsurprisingly, the law is to the contrary. All of Biosuccess’s claims are ripe—Defendants have breached duties to Biosuccess, infringed and misappropriated its hard-won intellectual property, and destroyed its valuable data. As detailed below, each of Biosuccess’s claims for relief is adequately pled and Defendants’ Motion to Dismiss (Dkt. No. 30, “Motion”) should be denied in its entirety.

## LEGAL STANDARDS

A pleading should set forth a “short and plain statement” of the claim asserted. Fed. R. Civ. P. 8; *see also O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1366 (Fed. Cir. 2006) (stating that the Federal Rules replaced a system in which the issues had to be conclusively defined at

1 the outset of litigation through the pleadings with a system that relied on  
 2 discovery and pretrial hearings to gradually identify the precise issues in  
 3 dispute as more information became available); *McZeal v. Sprint Nextel*  
 4 *Corp.*, 501 F.3d 1354, 1357 n.4 (Fed. Cir. 2007) (holding that the Supreme  
 5 Court’s decision in *Twombly* did not change the pleading requirements of  
 6 Federal Rule of Civil Procedure 8 in actions for patent infringement).

7 Since the crux of Rule 8 is to provide a party fair notice of the claim  
 8 against which it must defend, excessive detail is not required to properly state  
 9 a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rather, a claim is  
 10 well-pled so long as the complainant has provided the defendant “fair notice  
 11 of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp.*  
 12 *v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted)  
 13 (emphasis added); *see also Erickson v. Pardus*, 551 U.S. 89, 93 (2007)  
 14 (“[s]pecific facts are not necessary . . .”); *Iqbal*, 556 U.S. at 680 (stating that  
 15 factual allegations need only move a claim “across the line from conceivable  
 16 to plausible.”). “Rule 12(b)(6) motions are viewed with disfavor.” *Broam v.*  
 17 *Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003) (citing *Gilligan v. Jamco Dev.*  
 18 *Corp.*, 108 F.3d 246, 248-49 (9th Cir. 1997)).

19 “Dismissal without leave to amend is proper only in ‘extraordinary’  
 20 cases.” *Id.* at 1028 (internal citation omitted). On a motion to dismiss, the  
 21 court should accept as true all facts alleged in the complaint, and draw all  
 22 reasonable inferences in favor of the plaintiff. *Newcal Indus., Inc. v. Ikon*  
 23 *Office Solution*, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008).

24 Further, in reviewing the sufficiency of a complaint, “[t]he issue is not  
 25 whether a plaintiff will ultimately prevail but whether the claimant is entitled  
 26 to offer evidence to support the claims.” *Gilligan*, 108 F.3d at 249. Thus, the  
 27 Court’s task is merely to assess the legal feasibility of the complaint, not to  
 28 assess the weight of the evidence which might be offered in support thereof.

*Roberts v. N. Am. Van Lines*, 394 F. Supp. 2d 1174, 1178 (N.D. Cal. 2004).

## ARGUMENT

**I. Defendants' Motion Should Be Denied for Failure to Meet and Confer as Required By Local Rule 7-3.**

Defendants' Motion is procedurally defective and should be denied outright for failure to comply with both the letter and spirit of Civil Local Rule 7-3, which requires that a movant meet and confer in good faith with opposing counsel at least seven (7) days prior to filing its motion. Rule 7-3 obligated Defendants to make a reasonable effort to contact opposing counsel, which they failed to do. This is readily corroborated by their omission of the required language set forth in the Local Rule regarding conferences of counsel: "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on (date)." Civ. L.R. 7-3.

Instead, Defendants claim that they “attempted to meet and confer with counsel for Plaintiff” and “offered to stipulate to the filing of an amended complaint within the next 20 days.” Liang Declaration ISO Opposition (“Liang Decl.”), ¶ 2 & Exh. A. What Defendants neglect to mention is that their “attempt” to meet and confer occurred *fewer than seven hours before* they filed this Motion. Liang Decl., ¶ 2 & Exhs. A & B. This conduct is particularly egregious in light of the fact that Biosuccess had previously granted Defendants *two* extensions to respond to the Complaint and even agreed to withdraw its Motion for Default Judgment against Defendant Rich Pharmaceuticals. Liang Decl., ¶¶ 3-4 & Exhs. C & D. Defendants should not have waited until the last minute to request a meet and confer and can provide no excuse for their delay.

Moreover, this is now *at least the third time* that counsel for Defendants, Jack Russo, has failed to follow Local Rules. Mr. Russo represents Plaintiff Richard Chang in related Case No. 2:13-cv-1340-JAK,

1 brought by Richard Chang against Biosuccess (the “R. Chang Case”). In that  
 2 case, (1) Mr. Russo violated Local Rules 7 and 37 by filing a defective  
 3 “motion to compel” that lacked the meet/confer certification and was not  
 4 even in the form of a joint stipulation; after Biosuccess counsel pointed this  
 5 out and threatened sanctions, Mr. Russo withdrew the motion (*see* Liang  
 6 Decl. ¶ 5 & Exh. E); (2) next, Mr. Russo violated Local Rules 7 and 56 by  
 7 filing a defective summary judgment motion that lacked the meet/confer  
 8 certification and failed to submit the required “Statement of Uncontroverted  
 9 Facts and Conclusions of Law”; counsel for Biosuccess pointed this out to  
 10 Mr. Russo, but Mr. Russo proceeded to file this procedurally defective  
 11 Motion anyway (*see* Liang Decl., ¶ 6 & Exh. F).

12 Defendants’ Motion should therefore be denied as procedurally  
 13 defective for failing to comply with Civil L.R. 7-3. *See Singer v. Live Nation*  
 14 *Worldwide, Inc.*, 2012 WL 123146, \*1-2 (C.D. Cal. Jan. 13, 2012) (denying  
 15 motion for violation of Civ. L.R. 7-3 where party sent letter a “mere three  
 16 days” before motion was filed; holding that “conversations about the merits  
 17 of [ ] claims” “do not equate with discussions regarding a contemplated  
 18 motion”); *Valdovinos v. County of Los Angeles*, 2008 WL 2872648, \*1-2  
 19 (C.D. Cal. July 23, 2008) (denying motions for failure to comply with Civ.  
 20 L.R. 7-3).

21 **II. Plaintiff Has Sufficiently Pled a Claim for Patent  
 22 Infringement.**

23 Defendants do not appear to challenge Biosuccess’s claim for direct  
 24 patent infringement. A claim for patent infringement requires “(1) an  
 25 allegation of jurisdiction; (2) a statement that the plaintiff owns the patent; (3)  
 26 a statement that defendant has been infringing the patent ‘by making, selling,  
 27 and using [the composition or product] embodying the patent’; (4) a  
 28 statement that the plaintiff has given the defendant notice of its infringement;

1 and (5) a demand for an injunction and damages.” *In re Bill of Lading*, 681  
 2 F.3d 1323 (Fed. Cir. 2012) (holding that allegations that meet the  
 3 requirements of model “Complaint for Patent Infringement” Form 18  
 4 satisfied pleading requirements). Biosuccess has indeed met the requirements  
 5 required for direct patent infringement. Complaint, ¶ 10 (jurisdiction); ¶¶ 33,  
 6 44 (ownership in the patent), ¶ 45 (infringement); ¶ 47 (notice of  
 7 infringement); ¶¶ 51-51 (demand). Indeed, Biosuccess’s patent complaint  
 8 tracks the Model. [Compare Biosuccess Complaint with Civil Form 18,  
 9 attached as Exh. G to Liang Decl.].

10 Instead, Defendants take issue with Biosuccess’s allegations of  
 11 contributory and infringement of the ‘814 Patent, citing paragraphs 48-49 of  
 12 the Complaint. *See* Mtn. at 4:3-11. However, Biosuccess has adequately pled  
 13 both induced infringement and contributory infringement at this stage. The  
 14 Federal Circuit has held that, to survive a motion to dismiss indirect  
 15 infringement claims, “complaints must contain facts plausibly showing”  
 16 indirect infringement, but “[t]his does not mean, however, that [plaintiff]  
 17 must prove its case at the pleading stage.” *In re Bill of Lading*, 681 F.3d at  
 18 1339. This plausibility requirement “is not akin to a ‘probability requirement  
 19 at the pleading stage; it simply calls for enough fact [s] to raise a reasonable  
 20 expectation that discovery will reveal’ that the defendant is liable for the  
 21 misconduct alleged.” *Id.* (quoting *Twombly*, 550 U.S. at 556). Biosuccess has  
 22 made such a showing, by alleging that Defendants have induced and  
 23 contributed to the infringement of the ‘814 Patent by making, using, selling,  
 24 offering to sell, and/or importing products to others through their website and  
 25 businesses. *See* Complaint, ¶¶ 25-37, 48-49.

26  
 27  
 28

1                   **III. Plaintiff Has Sufficiently Pled a Claim for Copyright**  
 2                   **Infringement.**

3                   **A. A registered copyright is not required to state a claim for**  
 4                   **copyright infringement.**

5                   Citing 17 U.S.C. § 411(a), Defendants argue that “a valid copyright  
 6 registration is an [sic] requirement for the Court to hear any claim for  
 7 copyright infringement under the Copyright Act.” Mtn. at 4:23-25.  
 8 Defendants are wrong. The Ninth Circuit has held that the filing of a  
 9 copyright application is sufficient. *Cosmetic Ideas, Inc. v. IAC/*  
 10 *InterActiveCorp.*, 606 F.3d 612, 621-22 (9th Cir. 2010) (“We therefore hold  
 11 that receipt by the Copyright Office of a complete application satisfies the  
 12 registration requirement of § 411(a).”) As the Court explained, “[t]his  
 13 interpretation ensures the broad copyright protection that the 1976 Act  
 14 provided.” *Id.* Additionally, it “also fully accomplishes the central purpose  
 15 of registration—the compilation of a robust national register of existing  
 16 copyrights—and at the same time avoids unfairness and waste of judicial  
 17 resources.” *Id.* (internal citations omitted).

18                   Biosuccess has filed a copyright application covering the material  
 19 asserted—namely, its website. Complaint, ¶ 28; *see* Liang Decl., Exh. H.  
 20 Moreover, this application was filed on October 29, 2013, over two months  
 21 before Biosuccess instituted this action. Therefore, § 411(a) does not bar  
 22 Biosuccess’s copyright infringement claim, which should proceed on the  
 23 merits. *Cosmetic Ideas*, 606 F.3d at 622.

24                   **B. The Complaint adequately alleges virtually identical copying**  
 25                   **by Defendants.**

26                   To state a claim for copyright infringement, Biosuccess must allege: (1)  
 27 which original works are the subject of the copyright claim; (2) that it owns  
 28 the copyrights in those works; (3) that the copyrights have been registered in

1 accordance with the statute, and (4) by what acts during what time the  
 2 defendants infringed. *E.W. Sounds, Inc. v. Phoenix*, 2012 WL 4003047, \*4  
 3 (C.D. Cal., Sept. 10, 2012). To prove infringement, a plaintiff must show (1)  
 4 ownership of a valid copyright, and (2) that defendants copied constituent  
 5 elements of the protected work that are original. *Three Boys Music Corp. v.*  
 6 *Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).

7 Because direct evidence of copying is rarely available and copying can  
 8 therefore be difficult to prove, a plaintiff “may establish copying by showing  
 9 (1) circumstantial evidence of access to the protected work, and (2)  
 10 substantial similarity of ‘ideas’ and ‘expression’ between the copyrighted  
 11 work and the allegedly infringing work.” *Jason v. Fonda*, 526 F. Supp. 774,  
 12 776 (C.D. Cal. 1981), *aff’d*, 698 F.2d 966 (9th Cir. 1982); *see also Three*  
 13 *Boys Music*, 212 F.3d at 481. Biosuccess has sufficiently alleged all these  
 14 elements. *See* Complaint, ¶¶ 38-41 (copyrighted subject matter is the  
 15 website), ¶ 38 (ownership); ¶ 13 (website is copyrighted); ¶¶ 39-40,  
 16 53(defendants’ actions).

17 Defendants argue that Biosuccess’s copyrighted materials are “thin”  
 18 because they are factual and scientific in nature. Therefore, Defendants argue,  
 19 to prove infringement, Biosuccess must show that the alleged copying was  
 20 “virtually identical.” Mtn. at 5:4-18. However, a work is copyrightable even  
 21 if it is compiled entirely of uncopyrightable elements. *See, e.g. Feist Publ’n,*  
 22 *Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991); *Metcalf v. Bochco*,  
 23 294 F.3d 1069, 1074 (9th Cir. 2002) (holding that particular sequence of  
 24 events in which an author strings a significant number of unprotectable  
 25 elements can itself be a protected element). Moreover, it is clear from the  
 26 facts alleged in the Complaint that Defendants’ copying of Biosuccess’s  
 27 website *was* virtually identical. *See* Complaint, ¶ 41. In many instances, the  
 28 copying was *verbatim*. *Id.* Defendants have created a virtually identical

1 compilation of graphics, texts, etc. for their website as that of Plaintiff's site,  
 2 and have done so not only by "copying" the website, but by taking the actual  
 3 data from Plaintiff and using it as their own.

4 In any event, the Court has no obligation to rule on the merits of  
 5 Biosuccess's copyright claim at this initial stage of the litigation. Substantial  
 6 similarity is a question of fact that courts should be hesitant to decide at even  
 7 the summary judgment stage and, therefore, should not be resolved on a  
 8 motion to dismiss. *See, e.g. Frybarger v. Int'l Bus. Machs. Corp.*, 812 F.2d  
 9 525, 528 (9th Cir. 1987) (stating that summary judgment is not highly  
 10 favored on the issue of substantial similarity); *Shaw v. Lindheim*, 919 F.2d  
 11 1353, 1355 (9th Cir. 1990) ("Where reasonable minds could differ on a  
 12 finding of substantial similarity, summary judgment is improper."). Thus, the  
 13 Court should not engage in an analysis of the similarity of the parties' works  
 14 at this stage.

15 **IV. Plaintiff Has Sufficiently Pled a Claim for Trade Secret  
 16 Misappropriation.**

17 In order to state a claim for trade secret misappropriation, Biosuccess  
 18 must allege: (1) the existence of a trade secret and (2) misappropriation of a  
 19 trade secret. Cal. Civ. Code § 3426.1(b). Biosuccess has more than met these  
 20 requirements. Defendants' reliance on case law requiring that the subject of  
 21 the trade secret be described with "sufficient particularity" is misplaced, as  
 22 that case concerned the sufficiency of identification of trade secrets on  
 23 summary judgment, *not* a motion to dismiss. Mtn. at 6:26-7:6 (citing *Mattel,  
 24 Inc. v. MGA Entm't Inc.*, 782 F. Supp. 2d 911, 989 (C.D. Cal. 2011)).

25 Biosuccess has identified its trade secrets. It alleges that Ben Chang  
 26 had access to "all of Biosuccess's most sensitive trade secrets, ***including  
 27 years of research data related to PD-616 and its proprietary formulations.***"  
 28 Complaint, ¶ 20 (emphasis added); *see also* Complaint, ¶ 63. Moreover,

1 Biosuccess has adequately stated that Defendants misappropriated these trade  
 2 secrets. *See* Complaint, ¶ 23 (taking of trade secrets); ¶¶ 25-37 (disclosure of  
 3 trade secrets). The Court should not dismiss this claim.

4 **V. Plaintiff's Common Law Claims Are Not Preempted.**

5 **A. Plaintiff's common law claims are not based on upon  
 6 misappropriation of a trade secret.**

7 Defendants argue that the following causes of action are preempted by  
 8 that California Uniform Trade Secrets Act (CUTSA): Fourth (breach of  
 9 fiduciary duty), Fifth (unfair competition under Bus. & Prof. Code § 17200),  
 10 Sixth (common law unfair competition), Ninth (inducing breach of contract),  
 11 Tenth (inducing breach of fiduciary duty), Eleventh (conversion), Twelfth  
 12 (conspiracy), and Thirteenth (aiding and abetting). Defendants are wrong.

13 Defendants rely on *K.C. Multimedia Inc. v. Bank of Am. Tech. &*  
 14 *Operations, Inc.*, 171 Cal App. 4th 939, 954 (2009) for this proposition. But  
 15 as that case makes clear, the CUTSA does not preempt “other civil remedies  
 16 ***that are not based upon misappropriation of a trade secret.***” *Id.* at 954  
 17 (quoting § 3426.7) (emphasis added). It is important to note that Biosuccess  
 18 alleges not only misappropriation of trade secrets, but also other confidential  
 19 information. *See e.g.*, Complaint, ¶ 25 (payroll information). This is a much  
 20 broader definition than that of a trade secret in CUTSA. *See* Cal. Civ. Code  
 21 § 3426.1(d). Therefore, Biosuccess’s common law claims should not be  
 22 dismissed. *See First Advantage Background Servs. Corp. v. Private Eyes,*  
 23 *Inc.*, 569 F. Supp. 2d 929, 942 (N.D. Cal. 2008) (CUTSA does not preempt  
 24 where the “confidential information at the foundation of the claim is not a  
 25 trade secret, as that term is defined in CUTSA” because “[b]y its own  
 26 terms, . . . CUTSA only provides remedies for misappropriation of *trade*  
 27 *secrets*, not of any confidential information, and defines that term specifically.  
 28 See Cal. Civ. Code §§ 3426.1(b), (d), 3426.2, 3426.3.”); *c.f.* *SunPower Corp.*

1       v. *SolarCity Corp.*, 2010 WL 6160472 (N.D. Cal. Dec. 11, 2012) (noting  
 2       disagreement among courts).

3       Regardless, although the misappropriation of trade secrets and  
 4       confidential information form part of the facts here, Defendants have  
 5       engaged in several separate and independent wrongful acts. None of the eight  
 6       claims at issue here are based on the same facts or theories of recovery as  
 7       misappropriation:

8       ***Claim 4—Breach of Fiduciary Duty:*** The Complaint alleges that Ben  
 9       Chang breached his fiduciary duties of loyalty and confidentiality as an  
 10       officer of Biosuccess by undertaking a number of bad acts, including:  
 11       deleting emails and computer files (¶ 22); spreading untrue and misleading  
 12       statements to employees of Biosuccess's U.S. subsidiary (¶ 25); attempting  
 13       to induce Dr. Han to leave Biosuccess (¶ 25); and setting up a competing  
 14       business by exploiting Biosuccess's intellectual property (¶ 37). This claim  
 15       is clearly not based upon misappropriation of a trade secret.

16       ***Claims 5 and 6—Unfair Competition:*** The Complaint alleges that all  
 17       Defendants engaged in unlawful, unethical, or immoral acts, including:  
 18       spreading untrue and misleading statements to employees of Biosuccess's  
 19       U.S. subsidiary (¶ 25); attempting to induce Dr. Han to leave Biosuccess  
 20       (¶ 25); and setting up a competing business by exploiting Biosuccess's  
 21       intellectual property (¶ 37). This claim is also clearly not based upon  
 22       misappropriation of a trade secret.

23       ***Claims 9 and 10—Inducing Breach of Contract and Inducing***  
 24       ***Breach of Fiduciary Duty:*** The Complaint alleges that Defendants Rich  
 25       Pharmaceuticals, Imagic and RLC Holdings all induced Ben Chang and third  
 26       parties Dr. Han and Richard Chang to breach their non-disclosure agreements  
 27       and fiduciary duties of loyalty and confidentiality as an officer of Biosuccess,  
 28       including by: attempting to induce Dr. Han to leave Biosuccess (¶ 25); and

1 offering them executive positions in exchange for their agreement to work  
 2 with the entity defendants to exploit Biosuccess's intellectual property (¶¶ 28,  
 3 35, 37). This claim is clearly not based upon misappropriation of a trade  
 4 secret.

5 ***Claim 11—Conversion:*** The Complaint alleges that Ben Chang  
 6 accessed and deleted information on Biosuccess's computers without  
 7 authorization (¶ 22), which itself is a wrongful act independent of trade secret  
 8 misappropriation. *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559, 1566  
 9 n.7 (1996) (characterizing unauthorized access of a computer as being “in the  
 10 nature of a trespass”).

11 ***Claims 12 and 13—Conspiracy and Aiding and Abetting:*** Defendants  
 12 are liable for civil conspiracy and aiding and abetting because they agreed to  
 13 a common plan or design to commit a tortious act and thereby harmed  
 14 Biosuccess. Complaint, ¶ 25. Because none of the predicate torts that  
 15 defendants conspired to commit—discussed above—depend on trade secret,  
 16 these counts also are not preempted.

17 The facts critical to Biosuccess's common law claims are not the same  
 18 as the facts necessary to prove its trade secret misappropriation claim. Should  
 19 the Court decide otherwise, Biosuccess respectfully requests leave to amend  
 20 to separately set forth additional allegations supporting these claims.

21 **B. It is premature for the Court to dismiss these claims on the  
 22 basis of preemption.**

23 Some courts have held that it is premature to dismiss claims before  
 24 first resolving the factual question of whether the information at issue  
 25 qualifies as a trade secret under CUTSA. *See, e.g., Amron Int'l Diving Supply,  
 26 Inc. v. Hyrdolinx Diving Commc'n, Inc.*, 2011 WL 5025178, \*9-10 (S.D. Cal.  
 27 Oct. 21, 2011) (“Defendants’ motion to dismiss based on preemption cannot  
 28 be addressed until it is determined whether the allegedly misappropriated

1 information constitutes a trade secret. At this point in the case, the status of  
 2 the information is merely a matter of allegation and until the distinction is  
 3 made between [plaintiff's] allegedly misappropriated trade secret information  
 4 and its confidential or non-confidential proprietary non-trade secret  
 5 information, the question of preemption should not be addressed."); *Think*  
 6 *Village-Kiwi, LLC v. Adobe Sys., Inc.*, 2009 WL 902337, \*3 (N.D. Cal. Apr.  
 7 1, 2009) (granting motion for leave to file amended complaint, holding that  
 8 “[t]he Court finds no authority holding that CUTSA preempts common law  
 9 claims even if the confidential information is a protectible [sic] interest other  
 10 than a trade secret”); *Phoenix Techs. Ltd. v. DeviceVM*, 2009 WL 4723400,  
 11 \*5 (N.D. Cal. Dec. 8, 2009) (ruling on motion to dismiss, distinguishing *K.C.*  
 12 *Multimedia*, and finding that because common law claims “are based on  
 13 Defendants’ diversion and/or wrongful use of Plaintiff’s ‘Proprietary  
 14 Information,’ as defined in the Agreement, these claims are not limited to  
 15 trade secrets and, thus, are not preempted”).

16 **C. Biosuccess may plead inconsistent claims.**

17 Although Biosuccess’s common law claims do not rely upon the same  
 18 facts as its trade secret claim as discussed above, the Federal Rules of Civil  
 19 Procedure also permit a party to plead alternative theories of relief and  
 20 inconsistent claims. Fed. R. Civ. P. 8(d)(3). Courts have agreed, refusing to  
 21 dismiss inconsistent theories of liability. *MB Financial Group, Inc. v. United*  
 22 *States Postal Service*, 545 F.3d 814, 819 (9th Cir. 2008) (noting that both  
 23 contract and tort claims could go forward since “a plaintiff is generally  
 24 entitled to plead alternative or multiple theories of recovery on the basis of  
 25 the same conduct on the part of the defendant.”).

26 Therefore, to the extent the Court finds that any of Biosuccess’s  
 27 common law claims are preempted by its claim for trade secret  
 28 misappropriation under the CUTSA, the common law claims should stand as

1 alternative theories of relief to Biosuccess's trade secret claim and therefore,  
 2 are not preempted. *See e.g., In Terarecon, Inc. v. Fovia, Inc.*, 2006 WL  
 3 1867734, \*10 (N.D. Cal. July 6, 2006) (finding conversion claim was  
 4 alternative theory to CUTSA claim). Biosuccess should therefore be  
 5 permitted to pursue alternative theories of liability pursuant to Rule 8(d).

6 **D. Defendants' preemption argument contradicts their argument  
 7 that the trade secret claim is insufficient.**

8 Defendants' argument that Biosuccess's common law claims are preempted  
 9 by its trade secret claim directly contradicts their argument that Biosuccess  
 10 has not sufficiently stated a claim for trade secret misappropriation under the  
 11 CUTSA. Under similar circumstances, one court has refused to find  
 12 preemption at the pleading stage, holding that the defendants' argument that  
 13 trade secret allegations are preempted by CUTSA contradicted their primary  
 14 defense that the plaintiff's information did not constitute trade secrets. *Think*  
 15 *Village-Kiwi*, 2009 WL 902337, \*2 (N.D. Cal. Apr. 1, 2009) (citing *Callaway*  
 16 *Golf Co. v. Dunlop Slazenger Group Americas, Inc.*, 295 F.Supp.2d 430, 437  
 17 (D. Del. 2003)). As the court there concluded, "Defendants cannot have it  
 18 both ways." *Id.*

19 **VI. Plaintiff's "Deletion" Claims Are Properly Pled.**

20 **A. Plaintiff's claim for unlawful destruction of computer data is  
 21 adequately pled.**

22 California Penal Code Section 502 requires allegations that a  
 23 defendant "[k]nowingly accesses and without permission adds, alters,  
 24 damages, deletes, or destroys any data . . . which reside or exist internal or  
 25 external to a computer, computer system or computer network." Cal. Penal  
 26 Code § 502(c)(4). Biosuccess's Complaint explains that Ben Chang  
 27 destroyed and erased all of the computer files in the Biosuccess system  
 28 related to its U.S. operations. Complaint, ¶ 96. Although Defendants claim

1 that no further allegations were made (Mtn. at 9:21-24), this is not true. The  
 2 Complaint also alleges Ben Chang refused to preserve documents and emails  
 3 on his computer as requested by Biosuccess, and that he instead “erased the  
 4 entire contents of his work related computer, including deleting all emails.”  
 5 Complaint, ¶ 22.

6 Biosuccess properly pleads a claim for violation of § 502. Biosuccess  
 7 has alleged that Ben Chang’s deletion of files was against Biosuccess’s  
 8 instructions, and therefore, without permission. *See Weingand v. Harland*  
 9 *Financial Solutions, Inc.*, 2012 WL 2327660, \*4 (N.D. Cal. June 19, 2012)  
 10 (declining “at this early stage of the proceedings” to conclude that party’s  
 11 “alleged conduct beyond his conditional access to [the] computer for the  
 12 purpose of obtaining files he did not have authority to access[,] is outside the  
 13 scope of § 502.”).

14 **B. Plaintiff’s claim for trespass to chattels is adequately pled.**

15 Defendants contend that Biosuccess’s claim for trespass to chattels  
 16 fails because the Complaint fails to put Ben Chang “on notice on what he is  
 17 being accused of.” Mtn. at 10:1-8. Again, Defendants are wrong. To state a  
 18 claim for trespass to chattels, a plaintiff need only allege: (1) defendant  
 19 intentionally and without authorization interfered with plaintiff’s possessory  
 20 interest in the computer system; and (2) defendant’s unauthorized use  
 21 proximately resulted in damage to plaintiff.” *eBay, Inc. v. Bidder’s Edge, Inc.*,  
 22 100 F. Supp. 2d 1058, 1069-70 (N.D. Cal. 2000) (citing *Thrifty-Tel, Inc. v.*  
 23 *Bezenek*, 46 Cal. App. 4th 1559, 1566 (1996)).

24 Biosuccess has pled that Ben Chang “intentionally and without  
 25 authorization interfered with Biosuccess’s possessory interest” in its  
 26 computers and files by deleting files from his laptop. Complaint, ¶ 102. *See*  
 27 *also* Complaint, ¶¶ 22, 96. Moreover, Biosuccess has pled damages of a  
 28

1 result of Ben Chang's conduct. Complaint, ¶ 103. Therefore, Defendants'  
2 motion to dismiss the trespass to chattels claim should be denied.

3 **LEAVE TO AMEND SHOULD BE GRANTED IF NECESSARY**

4 As explained above, Biosuccess believes its allegations are sufficient  
5 on all claims. Nevertheless, Biosuccess requests leave to amend its  
6 Complaint to the extent necessary to address any deficiencies identified by  
7 the Court. The Ninth Circuit has "repeatedly held that a district court should  
8 grant leave to amend even if no request to amend the pleadings is made,  
9 unless it determines that the pleading could not possibly be cured by the  
10 allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000)  
11 (citations and internal quotation marks omitted).

12 **CONCLUSION**

13 For the foregoing reasons, the Court should deny Defendants' Motion  
14 to Dismiss the Complaint in its entirety.

16 Dated: April 14, 2014

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